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SUPREME COURT, U.S.

No. 98-469

In The

Supreme Court of the United States

October Term, 1998

ALEKSANDR KASHUBA,

Petitioner,

v.

LEGION INSURANCE COMPANY,
c/o HAMILTON BALLARD, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents are dissatisfied with the Petitioner's presentation of the questions presented, and offer the following:

1. When an employer is unable to provide medical services, or is impeded from determining the nature and extent of a claimant's injury because of that claimant's untimely notice of injury, is that enough to establish "prejudice" as required by 33 U.S.C. §912(d)?

2. Does a federal appellate court exceed its standard of review where it examines an administrative law judge's decision for errors of law or failure to adhere to the substantial evidence standard?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Pursuant to Rules 14.1(b) and 29.6, Respondents offer the following additional information:

Party: *Northwest Marine, Inc.*

There are no parent companies, non-wholly owned subsidiaries or affiliates of Northwest Marine Inc.

Party: *Legion Insurance Company*

Mutual Risk Management, Ltd., a publicly traded company, is the parent company of Legion Insurance Company.

There are no non-wholly owned subsidiaries of respondent Legion Insurance Company.

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ARGUMENT – REASONS FOR DENYING THE WRIT

I. Contrary to Petitioner's assertion, the Ninth Circuit's Opinion does not create a conflict of law with the Fifth Circuit.

The Petitioner decries that the Ninth Circuit's Opinion below has created a conflict of law with the Fifth Circuit, as well as "a conflict which affects large numbers of claimants under the LHWCA." (Petition for Review p. 10). However, nothing could be further from the truth.

Petitioner asserts that the Ninth Circuit's Opinion holds that "an employer [can] establish that it has been prejudiced by a claimant's late notice of injury under Section 912(d)(2) of the Act . . . without presenting any evidence of post-notice attempts to investigate the claim, and without presenting any evidence that such attempts were futile." (Petition for Review p. 9). He then claims such a holding is contrary to the decisions of the Benefits Review Board[1] and the Fifth Circuit.

Within his first major paragraph, Petitioner makes two errors. First, he twists the Ninth Circuit's legal reasoning and holding in an attempt to fashion a palatable issue for this Court. Secondly, by ignoring what the Ninth Circuit actually held, he incorrectly announces that a conflict of law has been created.

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[1] As Petitioner correctly states, the Benefits Review Board's interpretations of the Act are not entitled to any special deference from this Court. *E.g., Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 258 (1980). Using Benefits Review Board cases as primary authority underscores the weakness of Petitioner's position.

The Longshore and Harbor Workers' Compensation Act provides that notice of an injury must be given to the employer within thirty days after the employee is aware or should have been aware of a relationship between the injury and the employment. 33 U.S.C. § 912(a). An exception to this rule is 33 U.S.C. § 912(d), which states that failure to give such notice does not bar a claim, if it is determined that the employer has not been prejudiced by the delay.[2]

According to the Petitioner, decisions of the Benefits Review Board and the Fifth Circuit hold that for an employer to establish prejudice it must present evidence of post-notice attempts to investigate the claim. (Petition for Review p. 9). However, conspicuously absent are legal citations to any legal authority supporting this proposition. Such a failure is understandable, as no court has ever required that an employer present evidence of post-notice attempts to investigate a claim.

What is required is that an employer provide actual evidence of prejudice, and not mere allegations. *ITO Corp. v. Director, OWCP*, 883 F.2d 422 (5th Cir. 1989); *see also Strachan Shipping Co. v. Davis*, 571 F.2d 968 (5th Cir. 1978). This evidence must establish one of two things: 1) that failure to receive timely notice of the employee's injury has impeded an employer's ability to investigate a claim to determine the nature and extent of the alleged injury; or 2) that failure to receive timely notice of the

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[2] In the instant case, Petitioner alleged he was injured on June 14, or 15, 1991, and underwent back surgery on September 12, 1991. His employer, Northwest Marine, Inc., first received notice of Petitioner's injury on October 21, 1991.

employee's injury has impeded an employer's ability to provide medical services. *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 1276 (9th Cir. 1998); *Strachan*, 571 F.2d at 972.

Inexplicably, the Petitioner offers this Court five cases that stand for the same proposition, and ironically, are in accord with the Ninth Circuit's holding that "[e]vidence that lack of timely notice did impede the employer's ability to determine the nature and extent of the injury or illness or to provide medical services is sufficient [to establish prejudice]; a conclusory allegation of prejudice is not." *Kashuba*, 139 F.3d at 1276; *accord ITO Corp.*, 883 F.2d 422 (5th Cir. 1989); *Cox v. Brady-Hamilton Stevedore Co.*, 25 Ben. Rev. Bd. Serv. (MB) 203 (Oct. 18, 1991); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 Ben. Rev. Bd. Serv. (MB) 233 (Mar. 30, 1990); *Bukovi v. Albina Engine*, 22 Ben. Rev. Bd. Serv. (MB) 97 (Nov. 30, 1988); *Williams v. Nicole Enterprises*, 21 Ben. Rev. Bd. Serv. (MB) 164 (Jun. 30, 1988). None of the cited cases stands for Petitioner's "post-notice" requirement.[3]

The only Fifth Circuit case cited by Petitioner is *ITO Corp.* According to the Petitioner's reading of this case, the Fifth Circuit requires an employer to present evidence

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[3] Petitioner never mentions that *both* the Ninth and Fifth Circuits allow an employer to prove prejudice by showing that it was unable to provide or participate in a claimant's medical care. In the instant case the Ninth Circuit found that "Employer should have been able to get a second opinion before Kashuba underwent surgery or at least been informed before such a major procedure." *Kashuba*, 139 F.2d at 1275.

of post-notice attempts to investigate a claim.[4] It is this faulty interpretation of *ITO Corp.* that Petitioner advances as being in conflict with the Ninth Circuit. However, all that *ITO Corp.* stands for is that prejudice cannot be found based merely on an employer's general claim of no opportunity to investigate a claim when it was fresh. 883 F.2d at 424. There is never any mention by the Fifth Circuit that an employer must present evidence of post-notice attempts to investigate a claim.

The only conflict that exists is Petitioner's conclusion that the Ninth Circuit's Opinion means an "employer can simply present argument, not evidence, and prevail." (Petition for Review p. 15). This statement is the exact opposite of what the Ninth Circuit held. Specifically, the court stated: "While this Circuit has not required evidence of post-notice investigation in order to show prejudice, we have not established what evidence would be sufficient." *Kashuba*, 139 F.2d at 1275. If the Petitioner's allegations were correct, the next sentence of the court's analysis should have read: "We find that if an employer alleges it was prejudiced by a claimant's late notice, then the claim is barred." Instead, the court examined what type of evidence the Fifth Circuit has found sufficient,[5]

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[4] This is the same erroneous interpretation of *ITO Corp.* that was made by the administrative law judge in the instant case. (Petitioner's App. E-25, 26).

[5] "The Fifth Circuit has stated that an employer can establish prejudice by providing substantial evidence that failure to receive timely notice of the injury has impeded its ability to investigate to determine the nature and extent of the alleged illness or to provide medical services." *Kashuba*, 139 F.3d at 1275, 1276 (citing *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972 (5th Cir. 1978)).

and adopted the Fifth Circuit's evidentiary standard. The court concluded, "[e]vidence that lack of timely notice did impede the employer's ability to determine the nature and extent of the injury or illness or to provide medical services is sufficient; a conclusory allegation of prejudice is not." *Id.* This rule is exactly the same as that followed in the Fifth Circuit.

Respondents contend that there is no viable conflict between the Ninth Circuit and the Fifth Circuit with respect to 33 U.S.C. § 912(d). With no conflict to resolve, the petition for writ of certiorari should be denied.

II. The Ninth Circuit did not exceed its standard of review

The Petitioner's other reason for petitioning this Court for a writ of certiorari is his claim that the Ninth Circuit exceeded its standard of review. (Petition for Review p. 16). He states that the court engaged in fact-finding and substituted its judgment for that of the ALJ. Again, a careful reading of the Opinion below demonstrates the fallacy of Petitioner's argument.

In determining the standard of review for this case, the Ninth Circuit wrote: "we proceed to review the ALJ's decision directly, and will reverse only for errors of law or failure to adhere to the substantial evidence standard." *Kashuba*, 139 F.2d at 1275. According to the Ninth Circuit, the ALJ in this case failed to adhere to the substantial evidence standard *and* committed an error of law – both grounds for reversal.

The Ninth Circuit found that the ALJ committed legal error by basing her decision on the rule that an employer must present evidence of post-notice attempts to investigate the facts of an injury in order to establish prejudice. (Petitioner's App. E-25, 26). In reviewing relevant case law the Ninth Circuit found that the ALJ was mistaken in making such an analysis. *Kashuba*, 139 F.3d at 1275. Rather than having an employer provide evidence as to its post-notice attempts to investigate a claim, the court required an employer to put forth evidence that late notice either impeded its ability to determine the nature and extent of any injury or to provide medical services. *Id.*

Besides finding that the ALJ committed an error of law, the Ninth Circuit found that the ALJ's decision was not supported by substantial evidence.[6]

The court found as a matter of law that the Respondent, Northwest Marine, Inc., had been prejudiced by: 1) its inability to participate in Petitioner's medical care; and 2) its inability to disprove that it had any liability for the claim at all. *Id.* The court's conclusion was not predicated upon a *de novo* review of the evidence, nor did it substitute its judgment for the ALJ below. Rather, the court looked at the evidence and found that the ALJ had failed to adhere to the substantial evidence standard. *See Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683 (9th Cir. 1997).

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[6] Substantial evidence means "more than a mere scintilla." It is evidence that a "reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

The Petitioner's argument that the Ninth Circuit exceeded its standard of review is baseless and this Court should not grant his petition for writ of certiorari.

CONCLUSION

Petitioner's presentation of the issues in this case leaves the impression that a major conflict now exists between the United States Courts of Appeals that affects "thousands of maritime workers" and that review should be granted to "tell the nation's dock workers and their employers that § 912(d)(2) means what it says." Were the Petitioner correct in his reading of the Ninth Circuit's Opinion, perhaps such rhetoric would hold more meaning. However, as shown above, no conflict exists regarding 33 U.S.C. § 912. All courts are in agreement that for an employer to prove prejudice by untimely notice it must put forth actual evidence that lack of timely notice impeded its ability to determine the nature and extent of the injury or illness or to provide medical services.

For the reasons given above, Respondents respectfully request that the petition for writ of certiorari be denied.

Dated: October 19, 1998

Respectfully submitted,

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